DATE: January 19, 1989

TO: Jack McGrory, Assistant City Manager
FROM: City Attorney
SUBJECT: Charter Section 129.1

On January 3, 1989, you forwarded to this office a letter addressed to John Lockwood, City Manager, from Mr. Ed Lehman, AFSCME Council 36 Representative, dated December 22, 1988. The letter states in part as follows:

> It has recently come to our attention that new employees are still required to sign a card (copy attached) indicating receipt of and adherence to City Charter Section 129.1. This Section purports to inform employees that there is no right to strike.
>
> In County Sanitation District No. 2 v. Los Angeles County Employees Assn, the California Supreme Court ruled that non-safety public employees do indeed have the right to strike. The units represented by AFSCME Local 127 are not comprised of safety employees. Therefore, Charter Section 129.1 as applied to employees hired in our units is contrary to State Law and we demand IMMEDIATE cessation of any practice requiring employees to agree not to strike. We also demand that all oaths on file be returned to employees with an explanation of their invalidity.

Mr. Lehman requested that the Charter Review Commission be apprised of this development, and he also asked for an expedited response.

Charter section 129.1, enacted in July of 1976, prohibits strikes by City employees and sets forth the procedural requirements for their removal. The California Supreme Court in County Sanitation District No. 2 v. Los Angeles County Employees Assn,

38 Cal.3d 564 (1985), cert. denied 474 U.S. 995, 106 S.Ct. 408,

88 L.Ed 2d 359, did not rule, as Mr. Lehman asserts, that non-safety public employees have the unrestricted right to strike. A correct statement of the Court's ruling is found at page 585 of the opinion:

> For the reasons stated above, we conclude that the

> common law prohibition against public sector strikes should not be recognized in this state. Consequently, strikes by public sector employees in this state as such are neither illegal nor tortious under California common law. We must immediately caution, however, that the right of public employees to strike is by no means unlimited. Prudence and concern for the general public welfare require certain restrictions.
>
> The Legislature has already prohibited strikes by firefighters under any circumstance. It may conclude that other categories of public employees perform such essential services that a strike would invariably result in imminent danger to public health and safety, and must therefore be prohibited.
>
> While the Legislature may enact such specific restrictions, the courts must proceed on a case-by-case basis. Certain existing statutory standards may properly guide them in this task. ...
>
> ┌emphasis addedσ

This opinion only reached the issue of the validity of the California common law prohibition against strikes by public employees. The Court specifically recognized the Legislature's authority, set forth in Labor Code section 1962, to ban strikes by firefighters. What was not addressed by the Court and is still at issue is the validity of a city charter provision banning strikes by public employees that was enacted prior to the Court's decision. It would be premature at this time to raise the many complex legal issues left unanswered by the Court in its opinion, except to state that at least one appellate court has recognized the narrowness of the Court's decision. The court in Vernon Fire Fighters Assn v. City of Vernon, 178 Cal.App 3d 710 (1986), stated: "It is clear that the County Sanitation Dist. decision does not apply to legislative prohibitions against strikes." Whether or not this rule will be held to apply to charter amendments is a matter which eventually must be decided by the courts. Nevertheless, even if the courts rule that the opinion's restriction on the prohibition of strikes by public employees is retroactive and applies to Charter section 129.1, strikes by public employees which pose an imminent danger to the public health and safety, regardless of job classification, are still unlawful.

Mr. Lehman also misstates the purpose of the form. The form does not require employees to "sign ... adherence to City Charter

Section 129.1." It only indicates that the employee has been given a copy of the section and apprised of its contents. Mr. Lehman may be confused because the original language of Charter section 129.1 states in part:

> I hereby acknowledge receipt of a copy of the provisions of Section 129.1 of the Charter of The City of San Diego and hereby declare that during the term of my employment with said City I shall neither instigate, participate in or afford leadership to a strike against said City or engage in any concerted action to withhold my services from the city.

However, as the attached June 22, 1977 Report to the Honor-able Mayor and City Council indicates, the oath provision of Charter section 129.1 was declared unconstitutional in Superior Court Case No. 386403 (California Teamsters etc., et al v. City, et al). The Report also provides guidance for implementing the requirement that City employees receive copies of City Charter section 129.1. That guidance is still valid. It states that employees need not be forced to sign the form, but that the employee's supervisor should record that the employee has been given a copy of Charter section 129.1 and apprised of its contents.

In conclusion, we believe that you may alleviate Mr. Lehman's concerns by forwarding him a copy of this Memorandum of Law and the June 22, 1977 Report. If Mr. Lehman desires to have the Charter Review Commission review section 129.1, he has the right (as does any other member of the public) to appear before the Commission and make that request. You are certainly under no obligation to perform that task for him.

JOHN W. WITT, City Attorney
By
John M. Kaheny
Chief Deputy City Attorney

JMK:mb:360:921:043.2
Attachment
ML-89-8